

# Canadian Journal of Family Law

---

Volume 28 | Number 2

---

2014

## *A v B and Attorney General of Quebec (Eric v Lola)*—The Implications for Cohabiting Couples Outside Quebec

Natasha Bakht

Follow this and additional works at: <https://commons.allard.ubc.ca/can-j-fam-l>



Part of the [Family Law Commons](#), and the [Law and Society Commons](#)

---

### Recommended Citation

Natasha Bakht, "*A v B and Attorney General of Quebec (Eric v Lola)*—The Implications for Cohabiting Couples Outside Quebec" (2014) 28:2 Can J Fam L 261.

The University of British Columbia (UBC) grants you a license to use this article under the [Creative Commons Attribution- NonCommercial-NoDerivatives 4.0 International \(CC BY-NC-ND 4.0\) licence](#). If you wish to use this article or excerpts of the article for other purposes such as commercial republication, contact UBC via the Canadian Journal of Family Law at [cdnjfl@interchange.ubc.ca](mailto:cdnjfl@interchange.ubc.ca)

# ***A V B AND ATTORNEY GENERAL OF QUEBEC (ERIC V LOLA)*—THE IMPLICATIONS FOR COHABITING COUPLES OUTSIDE QUEBEC**

**Natasha Bakht\***

On January 25, 2013 the Supreme Court of Canada released its decision in a case popularly known as *Eric v Lola*.<sup>1</sup> The issue raised by the parties was whether the exclusion of *de facto*<sup>2</sup> spouses in Quebec from property division and spousal support violated the equality rights guaranteed by section 15 of the *Canadian Charter of Rights and Freedoms*.<sup>3</sup> The majority of the Supreme Court held that there was an infringement of section 15, but the majority that upheld the law was composed of four judges who found no infringement and only one who found it justifiable under section 1, resulting controversially in Quebec being the only province in the country in which people

---

\* Natasha Bakht is an Associate Professor at the Faculty of Law, University of Ottawa. This paper was initially presented at the County of Carleton Law Association Conference in April 2013. I would like to thank Jordan Palmer for his invaluable contribution as a research assistant. I am also grateful to Lynda Collins, Vanessa Gruben and the anonymous peer reviewers for their insightful comments.

<sup>1</sup> *Quebec (AG) v A*, 2013 SCC 5, [2013] 1 SCR 61, [*Eric v Lola*].

<sup>2</sup> I use the terms *de facto* or cohabiting spouses in this article to refer to couples that cohabit but are unmarried and not in a registered domestic partnership.

<sup>3</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

cohabiting in a conjugal relationship are not entitled to spousal support.<sup>4</sup>

This paper will comment on *Eric v Lola* by comparing it to an earlier family law case, *Nova Scotia (Attorney General) v Walsh*.<sup>5</sup> It will consider the very similar arguments made in these cases about the “choice” to marry and the economic consequences that befall women when legislative benefits given to married people are not extended to cohabiting couples. The paper will argue that although the consequences of the decision in *Eric v Lola* reinforces *Walsh* in that unmarried cohabiting couples in some provinces still do not have the same legislative benefits extended to them upon relationship breakdown, the equality analysis in *Eric v Lola* in fact overturns *Walsh*. The example of same-sex spousal litigation, which moved from legal defeats to legal wins, is used to suggest that the extension of equal rights to cohabitants may also take time. The incremental evolution of equality jurisprudence among other changes offers hope that cohabiting couples may eventually have full marital benefits extended to them.

### **COMPARING “CHOICE” IN *ERIC V LOLA* AND *WALSH V BONA***

The couple in *Eric v Lola* had been in a *de facto* relationship for seven years and had three children together. “Lola” was 17, living with her parents in their native country and attending school when the couple met. “Eric” was 32 and running an

---

<sup>4</sup> Over one third of cohabiting spouses in Quebec are unmarried, while in the rest of Canada only 16.7% of census families are cohabiting spouses (Statistics Canada, 2012, *Portrait of Families and Living Arrangements in Canada: Families, Households and Marital Status*, Statistics Canada Catalogue no. 98-312-X201 1001, Ottawa, Ontario, p 6)

<sup>5</sup> *Nova Scotia (AG) v Walsh*, 2002 SCC 83, [2002] 4 SCR 325 [*Walsh*].

international business. “Eric” provided “Lola” with financial support so that she could continue her schooling. During the time the couple was together, “Lola” did not hold employment outside of the home. “Lola” had wanted to get married, but “Eric” refused.<sup>6</sup>

This case replicates in many ways the arguments made in the earlier Supreme Court of Canada decision, *Walsh*, which held that the exclusion of unmarried different-sex couples from the provincial default property regime was constitutional. Ms. Walsh and Mr. Bona cohabited in a conjugal relationship for approximately 10 years and two children were born of the relationship. Upon separation, Mr. Bona retained all of the properties in his name, including a cottage, a vehicle, pensions and RRSPs, worth approximately \$116,000.<sup>7</sup> Ms. Walsh sought a declaration that the Nova Scotia *Matrimonial Property Act*<sup>8</sup> was unconstitutional in failing to provide her with the presumption, applicable to married spouses, of an equal division of matrimonial property.

Ms. Walsh argued that the decision to marry may not always be under one partner’s control, particularly where the other person refuses to marry or register a domestic partnership.<sup>9</sup> For both Walsh and “Lola”, this was the case.

---

<sup>6</sup> *Eric v Lola*, *supra* note 1 at para 5. Like other couples whose family law cases find their way to the Supreme Court of Canada, “Eric” and “Lola” were wealthy. Though “Lola” was not entitled to spousal support and division of matrimonial property, she was unlikely to be left destitute because of the high child support awards she was entitled to. Nonetheless the implications of this case on poorer families are critical as the denial of spousal support and division of property will exacerbate the economic consequences of separation on women and children.

<sup>7</sup> *Walsh*, *supra* note 5 at para 3.

<sup>8</sup> *Matrimonial Property Act*, RSNS 1989, c 275.

<sup>9</sup> *Ibid* at para 56.

They wanted to marry, but their partners refused, leaving them in a legally disadvantageous position compared to married people at the end of their relationships.<sup>10</sup> By contrast, the Attorney Generals and male partners<sup>11</sup> in these cases argued that excluding cohabiting couples from the benefits afforded married couples corresponded to the choice made by cohabiting couples not to marry. In not marrying, they were making a deliberate choice not to have the benefits associated with marriage extended to them. The majority of the *Walsh* Court agreed with this argument. It held that persons entering into a conjugal relationship without marrying are not entering into a relationship on the same terms as persons who marry, thus, any differential treatment in the legislation is not discriminatory and does not affect their dignity.

Much of the majority's analysis in *Walsh* focused on the conscious "choice" made by cohabiting couples to avoid the institution of marriage and the legal consequences that flow

---

<sup>10</sup> Angela Campbell has argued that those women in Quebec who work in the paid labour force and make more money than their conjugal partners may benefit from *Eric v Lola* because they would not be obligated to pay spousal support at the dissolution of their relationship. Angela Campbell, "Supreme Court's common-law decision may be good for women", *The Globe and Mail* (January 25 2013). While this may be true, most women do not find themselves in this situation. A Statistics Canada survey indicates that the average female earnings in 2011 for all Canadian earners was \$32,100, only 66.7% of the average male earnings (\$48, 100) and with a median female income of only 66.5% of the median male earnings. See Canadian Socio-Economic Management System (CANSIM), "Table 202-0102: Average female and male earnings, and female-to-male earnings ratio, by work activity, 2011 constant dollars", online: Statistics Canada <<http://www5.statcan.gc.ca/>>.

<sup>11</sup> "Eric" or "B" was a party to the case at the Supreme Court of Canada. In *Walsh*, the male partner, Bona, was not a party to the case at the Supreme Court as the couple had settled between them property division subsequent to leave being granted to the Supreme Court.

from it. The Court held that to bind *de facto* couples to the same division of property rules as married couples effectively nullifies the individual's freedom to choose alternate family forms and to have that choice respected and legitimated by the state.<sup>12</sup>

There has been much scholarly analysis about the *Walsh* decision,<sup>13</sup> its "theoretical freedom to choose" for some, and its impact on vulnerable individuals, women in particular. The research demonstrates that when relationships end, both members of the couple will suffer negative economic consequences, but women in particular bear the greatest burden.<sup>14</sup> Legislative schemes such as property sharing and spousal support were primarily enacted in order to alleviate some of the economic difficulties that arise for those most vulnerable upon the breakdown of a family. Moreover, in entering a non-marriage but long-term conjugal relationship, one or both partners may be forgoing economic advancement,

---

<sup>12</sup> *Walsh, supra* note 5 at para 43. See also Maxine Eichner, "Marriage and the Elephant: The Liberal Democratic State's Regulation of Intimate Relationships Between Adults" (2007) 30 *Harvard J L & Gender* 25.

<sup>13</sup> See for example, Carol Rogerson, "Developments in Family Law: The 2002-2003 Term" (2003) 22 *Sup Ct L Rev* (2d) 273; DA Rollie Thompson, "Walsh v Bona: Annotated" (2003) 32 *RFL* (5th) 87; Mary Jane Mossman, *Families and the Law in Canada: Cases and Commentary* (Toronto: Emond Montgomery, 2004) at 391. See also Robert Leckey, "Gimme Shelter" (2011) 34 *Dal LJ* 197, who prefers a narrow reading of *Walsh* leaving open the status of measures protecting the family home as shelter.

<sup>14</sup> See for example LJ Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York: Free Press, 1985) at 323 and Ross Finnie, "Women, Men, and the Economic Consequences of Divorce: Evidence from the Canadian Longitudinal Data" (1993) 30:2 *Canadian Review of Sociology and Anthropology* 205.

opportunity or even self-support. Where people in *de facto* relationships do not have access to the entire “economic readjustment” package<sup>15</sup> available to married persons upon relationship dissolution, we see an exacerbation of the feminization of poverty<sup>16</sup> by leaving many cohabiting women economically devastated by relationship breakdown. The dissenting opinions in both *Walsh* and *Eric v Lola* offer ample and compelling reasons why no legislative distinction ought to be maintained between married and cohabiting couples such as equal need and the illusory nature of personal autonomy in this status, while still permitting couples to agree to opt out of such legislative schemes should they so desire.

The decision in *Eric v Lola* reinforces *Walsh*, in that *de facto* couples in some provinces and territories still do not have the same legislative benefits extended to them upon relationship breakdown like married couples. However, the court’s analysis in *Eric v Lola* differs from that in *Walsh*, which may have important implications for couples in Alberta,<sup>17</sup> New Brunswick,<sup>18</sup> Newfoundland,<sup>19</sup> Nova Scotia,<sup>20</sup>

---

<sup>15</sup> Mary Jane Mossman, *Families and the Law: Cases and Commentary* (Concord: Captus Press, 2012) at 412. Cohabiting couples that wish to claim property division on separation must rely either on a domestic contract or the equitable doctrine of unjust enrichment, proving which can be a cumbersome process that is lengthy and expensive. See Philip M Epstein, “Annotation to *Kerr v. Baranow* and *Vanasse v. Seguin* and *Rubin v. Gendemann*” (2011) 93 RFL (6th) 192.

<sup>16</sup> *Moge v Moge*, [1992] 3 SCR 813, 99 DLR (4th) 456. See also Kathleen Lahey, “Women, Substantive Equality, and Fiscal Policy: Gender-Based Analysis of Taxes, Benefits, and Budgets” (2010) 22 CJWL 27.

<sup>17</sup> *Matrimonial Property Act*, RSA 2000, c M-8.

<sup>18</sup> *Marital Property Act*, RSNB 2012, c 107.

<sup>19</sup> *Family Law Act*, RSNL 1990, c F-2.

Ontario,<sup>21</sup> Prince Edward Island<sup>22</sup> and the Yukon Territory,<sup>23</sup> as these provinces and territories do not automatically extend a property division scheme to unmarried couples. Currently, only Manitoba,<sup>24</sup> Saskatchewan,<sup>25</sup> British Columbia,<sup>26</sup> the Northwest Territories<sup>27</sup> and Nunavut<sup>28</sup> extend the full status of marital partners to cohabitants.<sup>29</sup>

---

<sup>20</sup> *Matrimonial Property Act*, *supra* note 8. However, a partnership registered under Part II of the *Vital Statistics Act*, RSNS 1989, c 494 is eligible for property division.

<sup>21</sup> *Family Law Act*, RSO 1990, c F-3.

<sup>22</sup> *Family Law Act*, RSPEI 1988, c F-2.1.

<sup>23</sup> *Family Property and Support Act*, RSY 2002, c 83.

<sup>24</sup> See *The Family Property Act*, CCSM c F25.

<sup>25</sup> *The Family Property Act*, Chapter F-6.3 of the *Statutes of Saskatchewan, 1997* (effective March 1, 1998) as amended by the *Statutes of Saskatchewan, 1998*, c 48; 2000, c 70; 2001, c 34 and 51; 2010, c 10; and 2012, c 24.

<sup>26</sup> *Family Law Act*, SBC 2011, c 25, entry into force on 18 March 2013.

<sup>27</sup> *Family Law Act*, SNWT 1997, c 18.

<sup>28</sup> Nunavut's law on this topic incorporated the statute of the Northwest Territories and have not been altered. See *Family Law Act*, SNWT 1997, c 18, as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28.

<sup>29</sup> Each of the provinces and territories that extend the status of marital partners to cohabitants require a minimum period of cohabitation of 2 years. In addition, section 13.1 of Manitoba's *Vital Statistics Act*, CCSM, c V60, allows for registration of a cohabiting domestic partnership at any time during a relationship.



## EVOLVING EQUALITY FOR UNMARRIED COHABITANTS

In *Walsh*, the majority of the Court held that there was no section 15 violation in excluding different-sex cohabiting couples from the matrimonial property sharing scheme in the legislation. Madam Justice L'Heureux-Dubé was the sole dissenter, finding that the needs of married and unmarried cohabitants are often functionally equivalent. In *Eric v Lola*, five of the nine Supreme Court judges, including all four of the female judges, held the opposite of the *Walsh* majority: that the exclusion of *de facto* couples from all measures adopted to protect married persons violated section 15 of the *Charter*. Madam Justice Abella, writing for the majority, stated: "fairness requires that we look at the content of the relationship's social package, not at how it is wrapped."<sup>30</sup> She noted that: "[t]he right to support – and the obligation to pay it – did not rest on the legal status of either husband or wife, but on the reality of the dependence or vulnerability that the spousal relationship had created."<sup>31</sup>

Thus, the majority of the Supreme Court effectively overturned *Walsh*.<sup>32</sup> What has changed in the eleven years since *Walsh* for the Court to reverse its position? The day-to-day realities of married/registered relationships versus *de facto* relationships have remained similar both in relation to each

---

<sup>30</sup> *Eric v Lola*, *supra* note 1 at para 285.

<sup>31</sup> *Ibid* at para 296.

<sup>32</sup> Indeed, five of the nine judges state in *Eric v Lola* that they decline to follow *Walsh*. See Abella J at para 338 who notes: "I would, with respect, decline to follow *Walsh*." See also para 384 per Deschamps J and paras 347 and 422 where the Chief Justice states: "Like my colleague Abella J., I am of the view that *Walsh* does not bind this Court in the present case. *Walsh*...was decided at an earlier point in our evolving appreciation of s. 15."

other and in terms of the number of years that have passed since the *Walsh* decision. What has changed, however, is equality jurisprudence. The Supreme Court in *R v Kapp*<sup>33</sup> and *Withler v Canada*<sup>34</sup> undertook a revision of the *Law*<sup>35</sup> test after considering a number of criticisms by leading constitutional law experts.<sup>36</sup> While the section 15 equality test remains essentially the same in that it asks whether a legislative distinction based on an enumerated or analogous ground is discriminatory, the Court encouraged a more flexible, contextual inquiry that moved away from a rigid template to one that actually furthered substantive equality.

The *Walsh* majority's decision was problematic following the *Kapp/Withler* evolutions for two reasons. First, in their analysis that common law couples are free to choose to marry, the *Walsh* majority effectively collapsed public interest considerations of the reasonableness of the legislation, a matter to be analyzed under section 1, into the section 15 analysis. By so doing, the claimant bore the burden of proof that should properly have fallen to the responding government. Second, the effect of combining respect for choice into the equality analysis negated the recognition of marital status as an analogous ground per *Miron v Trudel*.<sup>37</sup> As Justice Abella noted, the reasoning of the *Walsh* majority illustrates the problems associated with finding the perfect comparator group: "In *Walsh*, the fact that the comparator group of married spouses

---

<sup>33</sup> *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483.

<sup>34</sup> *Withler v Canada*, 2011 SCC 12, [2011] 1 SCR 396.

<sup>35</sup> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 [Law].

<sup>36</sup> See for example Sanda Rodgers & Sheila McIntyre eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Toronto: LexisNexis Canada, 2006).

<sup>37</sup> *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693.

was not perfectly mirrored by the group of unmarried spouses, based on the heterogeneity of the latter, short-circuited the analysis of the actual adverse impact experienced by a significant proportion of unmarried spouses.”<sup>38</sup>

Thus the arguments concerning freedom of choice and individual autonomy that were found to belie a section 15 infringement in *Walsh*, were relegated to section 1 in *Eric v Lola*. Despite the divisions in the Court, only Justice Abella’s opinion found that exclusion from the property division regime could not be saved under section 1. Of the other four judges who found a section 15 violation, three held that spousal support is distinct from property division and thus could not be saved under section 1. The Chief Justice held that all of the *Civil Code*’s distinctions as between *de jure* and *de facto* spouses, though discriminatory, could be saved under section 1.<sup>39</sup>

If a constitutional challenge like *Walsh* were to arise in Ontario or another province/territory where unmarried couples are excluded from the legislative property regime, it is likely

---

<sup>38</sup> *Eric v Lola*, *supra* note 1 at para 346. In *Hodge v Canada (Minister of Human Resources Development)* 2004 SCC 65, a similar issue with the comparator group analysis arose when the Court held that for the purposes of survivor’s pension under the Canada Pension Plan, former unmarried spouses were properly compared not with separated, married spouses, but with divorced former spouses, resulting in the loss of their right to make a claim as soon as cohabitation ended.

<sup>39</sup> Some have suggested that the Chief Justice’s approach could be characterized “as an astute balancing about a politically sensitive issue” in the wake of some hostility to the *Charter* in Quebec. Some Quebecers view the *Charter* as an imposition by Ottawa since it was part of a Constitution that Quebec did not sign on to in 1982. See Nicholas Bala & Robert Leckey “Family Law and the *Charter*’s First 30 Years: An Impact Delayed, Deep, and Declining but Lasting” (2013) 32 Can Fam LQ 22 at 34-35.

that the Court would initially find that such a distinction is discriminatory and contrary to section 15. The discriminatory impact of the exclusion of cohabiting couples from the property-sharing regime in, for example, Ontario's *Family Law Act*,<sup>40</sup> would be on the basis of marital status, but strong arguments could be made about the gendered effects of the differential treatment of married and unmarried spouses. As LEAF argued in *Eric v Lola*, an examination of the lived effects and systemic outcomes would show that the legislation perpetuates prejudice and disadvantage experienced by women in cohabiting relationships by disregarding need.<sup>41</sup>

Whether such an infringement would survive a section 1 analysis would depend on a number of factors. Some may argue that the overturning of *Walsh* on the basis of section 15 means little if a majority of the nine judges would uphold any discrimination under section 1.<sup>42</sup> Indeed, there is a dearth of successful equality litigants even since the *Kapp/Withler* reformulation, despite the Court's renewed support of substantive equality. But I would suggest that a finding of no infringement of section 15 in *Walsh* to a prima facie infringement of section 15 in *Eric v Lola* is a noteworthy progression where there is a move to section 1 and the burden shifts to the government.

For the moment, Justice Abella is the only member of the Court who perceived no meaningful distinction between

---

<sup>40</sup> *Supra* note 21.

<sup>41</sup> *Quebec (Attorney General) v A*, 2013 SCC 5 (Factum of the Intervener, Women's Legal Education and Action Fund), online: LEAF <<http://leaf.ca/wordpress/wp-content/uploads/2011/10/LEAF-SCC-Factum-Final.pdf>>.

<sup>42</sup> See for example Patricia Hughes, "Supreme Court of Canada Equality Jurisprudence and 'Everyday Life'" (2012) 58 Sup Ct L Rev (2d) 245 at 255.

property and support worth justifying discriminatory legislation. I would echo the comments made by Professors Bala and Leckey that of the Supreme Court Justices, Justice Abella has the greatest experience in family law and offered the most fulsome and sophisticated analysis of the issue of choice:

She accepted that legislative recognition of a true mutual choice not to assume obligations in a *de facto* partnership might be constitutionally permissible, for instance by a presumption of inclusion subject to a consensual opting out. Given the vulnerability and lack of legal information of many *de facto* spouses, however, the utter lack of any protective framework, modifiable only by consensual opting-in or other contractual arrangement, did not minimally limit the right to equality.<sup>43</sup>

A legislative scheme that is presumptively inclusive of cohabiting couples,<sup>44</sup> but that nonetheless permits them to contract out of such a default scheme, is beneficial because it automatically protects those most vulnerable who would not have the resources or knowledge to opt out, while still permitting those who wish to be independent as to property to retain individual autonomy.<sup>45</sup> It would also rectify the ongoing

---

<sup>43</sup> Bala & Leckey, *supra* note 39 at 33. Justice Abella's dissent mirrors in many ways the dissent of Madam Justice L'Heureux-Dubé in *Walsh*, *supra* note 5.

<sup>44</sup> For further discussion in a similar vein, see Julia L Cardozo, "Let My Love Open the Door: The Case for Extending Marital Privileges to Unmarried Cohabitants" (2010) 10:2 U Md LJ Race Relig Gender & Class 375.

<sup>45</sup> Zheng Wu, *Cohabitation: An Alternative Form of Family Living* (Toronto: Oxford University Press, 2000) at 167. See also Winnifred Holland, "Intimate Relationships in the New Millennium: The

confusion among many as to the different consequences of marriage and cohabitation.<sup>46</sup> Property division upon relationship breakdown is particularly important where most of the couple's wealth is held in a single-family home, which is quite often the case for most middle-income families.

### THE ANALOGY OF SAME-SEX SPOUSAL LITIGATION

I suspect the Court's recent decision will discourage further litigation on this issue in the near future. However, the evolution of the majority's analysis in *Eric v Lola* is potentially a sign that foreshadows deeper changes to the law. If same-sex spousal litigation can be used as an analogy, we may be steadily heading in the direction of full recognition of rights for cohabiting spouses at the end of their relationships. There has been an evolution in the status of same-sex spousal rights over the years, from initial findings of non-discrimination in *Layland v Ontario*<sup>47</sup> and *Egan v Canada*,<sup>48</sup> to a finding of discrimination in *M v H*,<sup>49</sup> and finally, to full recognition with *Halpern v Canada*<sup>50</sup> and *Reference Re Same-Sex Marriage*.<sup>51</sup> In

---

Assimilation of Marriage and Cohabitation" (2000) 17:1 Can J Fam L 114 at 151-167.

<sup>46</sup> Wu, *ibid.*

<sup>47</sup> *Layland v Ontario (Minister of Consumer & Commercial Relations)*, [1993] OJ no 575, 14 OR (3d) 658 (Ont Div Ct) dismissing a claim by same-sex partners for the right to marry.

<sup>48</sup> *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609.

<sup>49</sup> *M v H*, [1999] 2 SCR 3, 171 DLR (4th) 577.

<sup>50</sup> *Halpern v Canada (AG)* (2002), 95 CRR (2d) 1, 60 OR (3d) 321 (Div Ct), upheld and with an expanded remedy in (2003), 65 OR (3d) 161 (CA).

<sup>51</sup> *Reference Re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698.

this slow and incremental way, recognition of full spousal status for cohabitants may well be in our future.<sup>52</sup>

With renewed emphasis on a substantive equality framework that examines the actual impact of distinctions in legislative benefits as between married and cohabiting couples rather than a philosophy of choice that only protects the partner wanting to avoid obligations, we have seen some changes in the Court's analytic approach. A *prima facie* infringement of section 15 and Justice Abella's strong dissent may be predictive of future judicial approaches.

We may well need more changes such as to the composition of the Court,<sup>53</sup> including perhaps an increased number of women judges, given the strong inclinations along gender lines in these cases. In *Eric v Lola*, all of the women judges found an infringement of section 15 of the *Charter*. In *Walsh*, Madam Justice L'Heureux-Dubé found an infringement of section 15 while Madam Justices McLachlin and Arbour did not. Justice Arbour has since left the Court and Chief Justice McLachlin has changed her view of the discrimination analysis for unmarried cohabitants under section 15. Clearly, women judges do not guarantee a particular result on constitutional issues, but the inclusion of more women judges is likely to bring a more nuanced and substantive gender analysis to these matters.

---

<sup>52</sup> For the progression and tactics that were used in the same-sex spousal public interest litigation see Christine Davies, "Canadian Same-Sex Marriage Litigation: Individual Rights, Community Strategy" (2008) 66:2 UT Fac L Rev 101.

<sup>53</sup> Indeed, the composition of the Supreme Court of Canada has already changed since *Eric v Lola* with the departures of Madam Justice Deschamps and Mr. Justice Fish, the appointment of Mr. Justice Wagner and the upcoming mandatory retirement of Mr. Justice LeBel.

Diversity in the makeup of a group not only liberates members of the minority group to be more forthcoming about their views and to share information they may have that is unique, but it also induces members of the majority to state their views more explicitly and to re-examine their assumptions. [This process] leads to more robust and well-informed decisions.<sup>54</sup>

Indeed, retired Supreme Court Justice Marie Deschamps has expressed public disappointment when the number of women judges on the highest court slipped from four to three.<sup>55</sup> The upcoming retirement of Mr. Justice Louis LeBel offers another opportunity to rectify this situation.

Some have suggested that registered partnerships may be an alternative for women in cohabitating relationships until full benefits are extended to cohabitants. Several provinces including Manitoba, Nova Scotia, Alberta and Quebec have created registered partnerships that extend the benefits of marriage, including property division, to cohabiting people.<sup>56</sup> This alternative legislative model is typically open to both same-sex and opposite sex partners, but was initially created for same-sex couples when marriage had not been legally available to them.<sup>57</sup> They remain for the most part unused.<sup>58</sup>

---

<sup>54</sup> Beth Bilson, "A Dividend of Diversity: The Impact of Diversity on Organizational Decision Making" (2011) 44 UBC L Rev 9 at 16.

<sup>55</sup> Sean Fine, "Gender balance at issue with Supreme Court vacancy", *The Globe and Mail* (September 25 2013) A7.

<sup>56</sup> For a fulsome discussion of registered domestic partnerships see Nicole LaViolette, "Waiting in a New Line at City Hall: Registered Partnerships as an Option for Relationship Recognition Reform in Canada" (2002) 19 Can J Fam L 115.

<sup>57</sup> *Ibid* at 117.

<sup>58</sup> *Ibid* at 157-158.



However, registered partnerships are beneficial to those who reject the institution of marriage or who are not in a conjugal relationship but wish to undertake mutual obligations.<sup>59</sup> Neither *Walsh* nor *Eric v Lola* preclude this type of legislation. Indeed, the cases suggest that the provinces retain autonomy in defining the mutual rights and obligations of unmarried spouses.<sup>60</sup> Importantly, registered partnerships may not be a viable option in terms of assisting women economically at the end of their relationships where their partners are unwilling to register the relationship. Like marriage, registered partnerships still require a positive step in order to be eligible for property division, which one member of the couple may not be willing to take. So the fact that civil unions exist in Quebec did not assist “Lola”, since “Eric” was unwilling to formalize their relationship whether through marriage or some other means. Thus, such women would remain susceptible to all of the same economic vulnerabilities upon relationship breakdown.

We need legislators to take the lead in extending full benefits to cohabitants without the need for any extra steps, which would diminish the urgency for judicial change. These developments are already on the horizon in some provinces. Manitoba and Saskatchewan both have legislation, enacted before *Walsh*, that provides for virtual equality between

---

<sup>59</sup> Alberta, for example, has enacted the *Adult Interdependent Relationships Act*, SA 2002, c A-4.5, which governs unmarried partnerships. Under this Act, relationships need not be conjugal, but must be a “relationship of interdependence” for a continuous period of 3 years or “some permanence” with a child to be eligible for coverage.

<sup>60</sup> *Eric v Lola*, *supra* note 1 at para 279: “Provincial legislatures have chosen to regulate the private relationships of common law spouses on the basis of their own provinces’ legislative objectives. Today, each province defines the effects of *de facto* unions or common law relationships differently, which is a mark of Canadian legal pluralism.” See also *Walsh*, *supra* note 5 at paras 77 and 161.

cohabitants and married spouses.<sup>61</sup> *De facto* couples are already included in the property schemes of the Northwest Territories and Nunavut.<sup>62</sup> As of very recently, British Columbia's legislation extends marital property rights to long-term unmarried partners.<sup>63</sup> Even in Quebec, following the decision in *Eric v Lola*, Justice Minister Bertrand St-Arnaud initially acknowledged a willingness to "reflect on the possibility of changing the law in order to grant greater economic protection to unmarried women involved in a common law relationship."<sup>64</sup> This was followed by the creation of a consultative committee with a mandate to consider whether large-scale reform of family law is in order in Quebec.<sup>65</sup> Each of these developments are positive progressions that we should see as getting us closer to full recognition of cohabitants' rights.

---

<sup>61</sup> See *supra* notes 24 and 25.

<sup>62</sup> See *supra* notes 27 and 28.

<sup>63</sup> See *supra* note 26.

<sup>64</sup> Rhéal Séguin, "Despite top court ruling, Quebec open to changing spousal-support law", *The Globe & Mail*, Jan 25, 2013 online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)>.

<sup>65</sup> Minister of Justice, Quebec, News Release "Le ministre de la Justice annonce la création d'un comité consultatif sur le droit de la famille" (19 April 2013) online: Portail Québec <<http://communiqués.gouv.qc.ca>>.